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IN THE

Supreme Court of the United States

October Term, 1962

No. 381

JAMES BATTAGLIA,
Petitioner.

AGAINST

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THEODORE R. KUPFERMAN,
Counsel for Petitioner,
500 Fifth Avenue,
New York 36, N. Y.

LODER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth 2-0689

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The undersigned counsel, on behalf of the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on June 4, 1962.

Opinions Below

The opinion of the District Court for the Southern District of New York (R. p. 19a) is reported at 199 F. Supp. 834. The opinion of the Court of Appeals for the Second Circuit (R. p. 25a) is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered June 4, 1962 (R. p. 34a), and a copy thereof is appended to this petition in the Appendix at page 33a. The jurisdiction of this Court is invoked under 28 U. S. C. section 1254(1).

Questions Presented

In a suit under the Suits in Admiralty Act, 46 U. S. C. Secs. 741-752, the petitioner was injured on October 15, 1959 and filed his libel in admiralty against the United States for his injuries on June 8, 1961. On the same day the libel was served on the United States Attorney for the Southern District of New York, but a copy of the libel was not mailed to the Attorney General of the United States, as required by Sec. 742 of the Suits in Admiralty Act, until October 26, 1961, the day after respondent had moved to dismiss the action for failure of service. The District Court granted respondent's motion to dismiss, albeit "reluctantly" (R. p. 21a), upon the authority of *City of New York* v. *McAllister Brothers, Inc.*, 278 F. 2d 708 (2 Cir., 1960). The Court of Appeals affirmed upon the same authority, and Judge Friendly "reluctantly" concurred by reason of the weight of authority within the Circuit, although he expressed his view that he "cannot believe" that Congress meant that every failure by a libelanf to comply with a procedural step required by the Suits in Admiralty Act is a jurisdictional failure (R. p. 31a).

Both the Circuit Court (R. p. 30a) and the District Court (R. p. 22a) declined to attach any significance to the petitioner's claim that various acts of the United

States Attorney were calculated to, and did, lull petitioner into believing that the required mailing had actually been made. The questions presented are:

1. Does the "forthwith" requirement of Section 742 of the Suits in Admiralty Act apply equally to the requirement of mailing to the Attorney General as to the requirement of service upon the United States Attorney?

2. Is the petitioner's omission for approximately 4½ months to mail a copy of the libel to the Attorney General a jurisdictional defect which the Court has no power to cure?

3. Should the District Court have made a determination whether the acts of the United States Attorney were wilfully calculated to, and did, contribute to the petitioner's omission to mail a copy of the libel to the Attorney General, and if the Court had found that the United States Attorney's acts intentionally contributed to the petitioner's default, should the Court then have granted petitioner leave to complete such mailing *nunc pro tunc*?

4. Was it the intention of Congress in enacting the Suits in Admiralty Act to render jurisdictional the requirement for service upon the Attorney General?

Statutes, Federal Rules and Regulations Involved

The pertinent portions of the Suits in Admiralty Act, 46 U. S. C. Secs. 741-752 are as follows:

Sec. 745 provides:

> "Suits as authorized by this chapter may be brought only within two years after the cause of action arises: . . ."

Sec. 743 provides:

> "Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties."

Sec. 742 provides:

> "Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation."

The same requirements apply to suits under the Public Vessels Act (46 U. S. C. section 782).

Statement

This suit under the Suits in Admiralty Act arises from an accident, in which petitioner claims to have sustained personal injuries, occurring on October 15, 1959. The basic facts pertaining to this application are as follows: The petitioner's libel was filed in the United States District Court for the Southern District of New York on June 8, 1961. On the same day, a copy of the libel was served upon the United States Attorney for the Southern Dis-

trict of New York. On October 25, 1961 the respondent, by the United States Attorney, moved for summary judgment upon the ground that the libelant had failed to effect service upon the United States within the statutory period of limitation. The following day, on October 26, 1961, petitioner mailed a copy of the libel by registered mail to the Attorney General of the United States. On November 2, 1961 the petitioner filed a sworn affidavit of such service and mailing with the Clerk of the District Court.

The facts claimed by the petitioner are that (R. pp. 14a and 15a) the omission to mail a copy of the libel to the Attorney General was the result of a clerical oversight, the attorney in charge of the matter believing that the mailing had been accomplished. On June 20, 1961 Mr. Brownley, the attorney in charge of the matter for petitioner's attorney, called the office of the United States Attorney to say that no answer had been received. The secretary to the Assistant United States Attorney in charge of the matter said that the answer to the libel was being worked upon and that it would be received by petitioner's attorney as soon as it was completed. On August 1, 1961 Mr. Brownley again called the United States Attorney's office and again was told that the answer was being prepared and would be served "very shortly". On August 14, 1961 Mr. Brownley sent a letter to the United States Attorney (R. p. 16a) advising that the answer had not been received and requesting that the United States Attorney contact Mr. Brownley with reference to the matter. The United States Attorney did not reply to that letter and Mr. Brownley again telephoned on September 22, 1961 and was advised that Mr. Hopkins, the Assistant United States Attorney handling the case, would telephone Mr. Brownley to discuss the matter. Mr. Brownley, finally, noted that his file of the case indicated

that the mailing to the Attorney General had been completed.

Respondent disputes these claims and asserts that. (R. p. 18a) the secretary of Mr. Hopkins, the Assistant United States Attorney in charge, was "under strict instructions in connection with this case to make no representations whatever as to the handling of the case or that Mr. Hopkins would call Mr. Brownley or take any other action whatever".

The District Court and the Court of Appeals interpreted the word "forthwith" in Section 742 of the Suits in Admiralty Act to require immediate mailing to the Attorney General. The Court of Appeals reasoned that such immediate service was a condition of the United States' sovereign consent to be sued (R. pp. 28a, 29a, 30a).

Reasons for Granting the Writ

The decision below should be reviewed because it erroneously interprets the Suits in Admiralty Act so as to subject a suitor to the hazards of technical compliance with procedural requirements not substantially affecting the right of the United States to adequate notice of the pendency of a suit. The decision below renders jurisdictional what is procedural and is far from achieving the aim of the admiralty law to "do substantial justice" (*Munson SS Line* v. *Glasgow Nav. Co.*, 235 Fed. 64, 66 (2 Cir., 1916)). The rule established by the court below would jealously circumscribe the consent of the United States to be sued. As stated in *Grillea* v. *United States*, 232 F. 2d 919, 921 (2 Cir., 1956):

> "We are to remember that the Suits in Admiralty Act is not to be construed with the same jeal-

> ousy that ordinarily circumscribes the consent of the United States to be sued; and that, moreover, it is in general true that statutes affecting the interests of seamen, enjoy a particularly latitudinary interpretation."

1. This case commends itself to action by the Supreme Court, among other reasons, because both the District Court and the concurring judge in the Court of Appeals came to their conclusion reluctantly, constrained by a Court of Appeals authority in their own Second Circuit. The authority relied upon was *City of New York* v. *McAllister Brothers, Inc.*, 278 F. 2d 708 (2 Cir., 1960). In the latter case, a petition to implead the United States was served within the statutory period of limitations, but not until two months after it was filed. The *McAllister* holding, that the impleading petition must be dismissed because the "forthwith" requirement is jurisdictional, was found controlling by both the District Court and the Court of Appeals. Distinctions between the two cases may readily be found. First, in the instant case service upon the United States Attorney was completed forthwith and only the mailing to the Attorney General was delayed; in *McAllister* neither service nor mailing was accomplished within the two month period. Further, in the instant case the contention was made, but has not been heard, that the respondent's conduct contributed to the petitioner's default: that factor was not present in *McAllister*.

Another case arising in the Court of Appeals for the Second Circuit was *Messenger* v. *United States*, 231 F. 2d 328 (2 Cir., 1956), in which case the court held that plaintiff's failure to make service upon the Attorney General by mailing required dismissal of an action against the United States under the Federal Tort Claims Act. While

concurring in the result, Judge Hincks concluded that (231 F. 2d at p. 332):

> "• • • the lack of personal jurisdiction over the United States does not in every case require a dismissal. The immediate effect of such a ruling, I think, is to leave the action pending in an incipient state, just as it was during the period intervening between the filing of the complaint and the attempted service made on the original summons. In such a situation, I think that in a proper case the court on motion has discretion to authorize the issue of a fresh summons through which by service in accordance with the Rules its jurisdiction over the defendant may be perfected.
>
> • • • • •
>
> "Consequently, even though the court below could properly have quashed the service I think that its dismissal of the action on jurisdictional grounds was erroneous."

The reasoning of Judge Hincks in the *Messenger* case was adopted by the Court of Appeals for the Ninth Circuit in *Rollins* v. *United States*, 286 F. 2d 761 (9 Cir., 1961), an action involving the Tort Claims Act. In the latter case the plaintiff failed to serve either the United States Attorney or the Attorney General within the two-year limitation period. After that period had expired an alias summons was issued and duly served. The United States moved to dismiss and the District Court granted the motion. The Court of Appeals reversed on the ground that it was error to dismiss the action for lack of jurisdiction.

In *Fugle* v. *United States*, 157 F. Supp. 81 (1957), the District Court for the District of Montana, Great Falls Division, relied upon Judge Hincks' concurring opinion in the *Messenger* case to hold that a failure to complete service upon the Attorney General within the two year limitations period because of the omission to mail the required copy of the summons and complaint to the Attorney General was not jurisdictional. The court applied a rule of "excusable neglect".

The origin of both the *Messenger* and *McAllister* doctrine in the Second Circuit stems from *Schnell* v. *United States*, 166 F. 2d 479 (2 Cir.) cert. denied 334 U. S. 833 (1948). In that case an admiralty action was dismissed because the libelant's election to proceed *in rem* rather than *in personam* required a new service both on the United States Attorney and the Attorney General, whereas only the United States Attorney had been served with the amended libel. It was that decision of which Judge Frank in his dissent said at page 484:

> "Accordingly, I think my colleagues' decision rests on the sheerest formality, and is therefore out of line with pertinent Supreme Court decisions; . . . .

The Supreme Court has once before rejected the view of the Second Circuit Court of Appeals that strict construction must be given to the provisions of the Suits in Admiralty Act permitting suits against the United States. In *Nahmeh* v. *United States*, 267 U. S. 122 (1925), this Court commented upon the decision of the Court of Appeals for the Second Circuit in *The Isonomia*, 285 Fed. 516 (1922), in which the Appellate Court held that the venue provisions of the Suits in Admiralty Act were jurisdictional, construing those provisions strictly be-

cause they depend on the statutory consent of the United States. The Supreme Court in the *Nahmeh* case, *supra*, at page 125 said:

> "The opinion in the *Isonomia* case was carefully prepared, but we think that the rule as to a strict construction of the language of statutes providing for suits against the United States was there carried too far. In taking away what was then the law, namely the right of claimants to sue merchant vessels of the United States as if they were private vessels, Congress was evidently anxious to consult the convenience of intending libelants as far as it could, * * *."

Judge Frank, in the *Schnell* case, *supra*, said:

> "We set back the clock if we reward procedural wiles."

The decision of the court below is not consistent with the principle underlying American admiralty law, as stated in *Benedict on Admiralty* (6th ed. 1940), section 223:

> "The grand object of doing justice between the parties is superior to technical rules and forms and where the stricter practice of the common law, or the civil law, might have turned a party out of court, or defeated or perverted justice by considering an arbitrary rule of procedure as paramount to all other considerations, the American admiralty has found, in the educated reason and cultivated discretion of the court, the means of defeating chicanery, rectifying mistakes, supplying deficiencies, and suggesting to the party the means of reconstructing his case, if necessary, without the

loss of such real progress as he may have already made."

2. The statute of limitations is of no effect in this case. As stated by the Court of Appeals (R. p. 27a):

> "The libel here was filed well within the two-year statutory period so that the suit was not time-barred by the statute of limitations. 'The institution of a suit in admiralty is marked by the filing of the libel.' *United Nations Relief and Rehabilitation Administration* v. *The Normacmail*, 99 F. Supp. 552, 554. See, also, as to libels, petitions and complaints, *Bates Mfg. Co.* v. *United States*, 303 U. S. 567 (1938); *Hoffman* v. *Halden* 268 F. 2d 281; *Ore S.S. Corp.* v. *Hassell*, 2 Cir., 1943, 137 F. 2d 326; *Huffmaster* v. *United States*, 186 F. Supp. 120; *Eagle* v. *United States*, 157 F. Supp. 81; *In re Ibrandtsen Co.* v. *United States*, 146 F. Supp. 516. Filing of the libel having been made within the statutory period and 'forthwith' service having been made on the United States Attorney, the only question before us is whether the failure to mail a copy of the libel to the Attorney General for a period of over four and one half months, regardless of whether such mailing was within or beyond the statutory period, prevented the court from obtaining jurisdiction over the United States. Compare *Bates Mfg. Co.* v. *United States*, *supra*."

The principle accepted by the Court of Appeals states the prevailing rule of law, as indicated by the authorities cited in the above quotation.

The statute of limitations is therefore tolled by the filing of the libel and the remaining question is whether

the word "forthwith" imposes a requirement upon the libelant which the Court lacks the power to ameliorate upon equitable considerations.

3. The word "forthwith" has a relative meaning according to the nature of the thing to be done and the reasonableness of the requirement; it varies with every particular case. *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 193 (1900). In admiralty cases the requirement must be measured by the purpose of the Suits in Admiralty Act. It was with the view that "The purpose of the Act was to grant seamen relief against the United States in its own courts." that the Supreme Court reversed a dismissal for failure to comply with the venue requirements of the statute. *Hoiness* v. *United States*, 335 U. S. 297, 302 (194[redacted]

In determining the meaning of the word "forthwith" as interpreted by the courts it may be observed that even those courts which hold that the word has a "peremptory connotation" enlarge the interpretation by adding "using every reasonable exertion to make compliance". For example, such was the interpretation of the California District Court in *California Casualty Indemnity Exchange* v. *United States*, 74 F. Supp. 404, 407 (1947). The court, in dismissing for failure to effect service, said:

> "The libelants here made no exertion whatever to comply with the statute."

In *Marich* v. *United States*, 84 F. Supp. 829, 832 (N. D. Calif., 1949), the court stated that the purpose of the "forthwith" requirement was to give government officials "seasonable" opportunity to gather data and witnesses. The court further said that the libelant must comply "substantially" with the requirements of service set forth

in the Act and concluded that the word "forthwith" "* * * ordinarily connotes the doing of the act within a reasonable time."

In the instant case service upon the United States Attorney was made "forthwith" by any definition, since it was made on the same day as the filing of the libel. In determining the reasonableness of the delay in mailing to the Attorney General, a factor affecting the question of reasonableness is that the Government, through its United States Attorney, was "forthwith" apprised of the commencement of the action.

Most important, however, is the fact that since "forthwith" connotes as soon as reasonably possible, it was error for the courts below to fail to hear and consider the issues involving the alleged acts of the respondent in lulling the petitioner's attorney into the belief that service was complete.

4. The questions presented by this case are of great and recurring significance in the administration of the Suits in Admiralty Act and elsewhere. The instant decision establishes a formal and technical rule barring suitors from the District Court. That rule has been self-perpetuating in the respective circuits but has never been resolved by the Supreme Court. It is submitted that the question whether seamen claimants are in all cases to be held to compliance with the "forthwith" language of the Act as a jurisdictional condition should finally be resolved by this Court. Just as the Supreme Court finally had to resolve the issue whether the venue requirements of the Act were jurisdictional, so it must put to rest the Circuit Courts' and District Courts' "reluctant" adherence to a restrictive rule to which they are unwillingly bound.

5. The rule established by *City of New York* v. *McAllister, supra*, is a rule without a reason. No present need exists for a "forthwith" service as interpreted by the courts below. There is no indication that the respondent will be prejudiced in any respect by failure to adhere to a concededly "strict" interpretation of the Suits in Admiralty Act, and this Court has expressly required that the Suits in Admiralty Act not be interpreted "in a restricted and distributive sense" but should have "its broad and ordinary meaning", since the purpose of the statute is "to consult the convenience of intending libellants as far as it could * * *." *Nahmeh* v. *United States, supra*, p. 126.

6. The serious questions of public policy involved here in limiting the right of seamen litigants to sue the United States make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

THEODORE R. KUPFERMAN,
Counsel for Petitioner.

NORTON I. KATZ,
SOL SCHWARTZ,
Of Counsel.

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of June one thousand nine hundred and sixty-two.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges.

JAMES BATTAGLIA,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARIO,
Clerk

Opinion of United States Court of Appeals for the Second Circuit

MOORE, *Circuit Judge*:

Libelant-appellant appeals from an order granting the respondent-appellee's (the Government) summary judgment motion pursuant to Rule 58(b), Rules of Practice in Admiralty and Maritime Cases, dismissing the libel on the grounds that libelant failed to effect service of process on the United States in that he failed to serve a copy of the libel on the Attorney General of the United States and file an affidavit of service as required by 46 U. S. C. §§742 and 782.

The libel alleged in substance that on October 15, 1959, libelant, while working as a stevedore aboard the U. S. N. S. Francis X. McGraw, owned and operated by the Government, was injured as a result of negligence and unseaworthiness.

Section 745, 46 U. S. C. A., provides for a two-year statute of limitations. On June 8, 1961, and within the statutory period, the libel was filed in the Southern District of New York and on the same day a copy was served on the United States Attorney for the District, thus complying with the requirement of Section 742 that the "libelant shall forthwith serve a copy of his libel on the United States Attorney for such district." He failed at that time to "mail a copy thereof by registered mail to the Attorney General of the United States" and to file an affidavit of "service and mailing." The section then provides that "Such service and mailing shall constitute valid service on the United States * * * "

On October 25, 1961, the Government made its motion claiming defective service. The next day, October 26, 1961,

libelant attempted to remedy the defect by mailing a copy of the libel to the Attorney General, and on November 2, 1961, filed an affidavit of service and mailing.

Libelant argues that the action was timely commenced by the filing of the libel and that prompt service on the United States Attorney satisfied what he calls "the primary, but indefinite procedural requirement" of sections 742 and 782. He regards the mailing to the Attorney General as a "minor, secondary item" which is "an ancient historical exhibit—interesting, but no longer needed today." The double requirement of service and mailing he characterizes as "obviously a superfluous formula." Therefore, he would force the Government, when it complains of failure to mail, to prove some prejudice thereby. Libelant also would gain support for his position from the fact that Congress did not repeat "forthwith" before "mail" in section 742 and did not define "forthwith" in terms of months or any specified period. Thus, he asks "what practical difference did it make to the interests of the United States that there was a delay of a little over 4 months in mailing a copy to the Attorney General?"

The libel here was filed well within the two-year statutory period so that the suit was not time-barred by the statute of limitations. "The institution of a suit in admiralty is marked by the filing of the libel." *United Nations Relief and Rehabilitation Administration* v. *The Mormacmail*, 99 F. Supp. 552, 554. See, also, as to libels, petitions and complaints, *Bates Mfg. Co.* v. *United States*, 303 U. S. 567 (1938); *Hoffman* v. *Halden*, 268 F. 2d 281; *Ore S.S. Corp.* v. *Hassell*, 2 Cir., 1943, 137 F. 2d 326; *Huffmaster* v. *United States*, 186 F. Supp. 120; *Fugle* v. *United States*, 157 F. Supp. 81; *In re Isbrandtsen Co.* v. *United States*, 146 F. Supp. 516. Filing of the libel hav-

ing been made within the statutory period and "forthwith" service having been made on the United States Attorney, the only question before us is whether the failure to mail a copy of the libel to the Attorney General for a period of over four and one-half months, regardless of whether such mailing was within or beyond the statutory period, prevented the court from obtaining jurisdiction over the United States. Compare *Bates Mfg. Co.* v. *United States, supra.*

"Suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed. *Reid* v. *United States*, 211 U. S. 529, 538." (*Munro* v. *United States*, 303 U. S. 36, 41 (1938).) Decisions, therefore, which might apply between ordinary litigants are not controlling where a suit against the United States is involved. There can be little doubt of the power of the sovereign to declare the manner in which it may be haled into court. Grammarians may debate whether the adverb "forthwith" modifies only the adjacent "serve" and not the subsequent verb "mail"; or because "serve" and "mail" are connected by the conjunctive "and" the adverb modifies both. From a practical point of view, the latter conclusion is more logical. First the section itself is revealing. "The libelant * * * shall file a sworn return of such service and mailing." It would scarcely be likely that "such" service, namely, "forthwith," would be linked to any mailing no matter how dilatory. The next sentence supplies a further clue in its declaration that "Such service and mailing shall constitute valid service on the United States." If, as libelant argues, service on the United States Attorney is the only primary requisite, the coupling of the words "such" and "mailing" is virtually read out of the statute.

Libelant's argument that notice to the United States Attorney should be adequate notice to the United States is not realistic. His conception of a United States Attorney "in his office snowbound" eventually using his "horse and buggy" to carry notice of the libel to the Attorney General may be somewhat altered by a more modern communication system but it ignores the function of the Attorney General's Office. The Attorney General is responsible for handling the nation-wide litigation against the Government. For convenience of litigants, actual personal service may be made in the appropriate district, thus avoiding the necessity of traveling from North Dakota (for example) to Washington, or engaging local Washington counsel, to make service. It is, nevertheless, equally important, if not more important, for the Attorney General to receive almost simultaneous notice. In final analysis, the ultimate final responsibility for the handling of cases, both as to pleading and trial tactics as well as possible settlements, is vested in the Attorney General. The local United States Attorneys are his deputies who possess such authority as he chooses to bestow upon them. See discussion of statutory responsibilities of the Attorney General in Judge Hincks's concurring opinion in *Messenger v. United States*, 2 Cir., 1956, 231 F. 2d 328, 332. This practical situation combined with the wording of section 742 impel the conclusion that "forthwith" applies both to service and mailing.

In *City of New York v. McAllister Brothers, Inc.*, 2 Cir., 1960, 278 F. 2d 708, this court held that service upon the United States Attorney and the Attorney General more than two months after filing was not service "forthwith" and affirmed a dismissal of the impleading petition against the United States. In *McAllister*, the service and mailing

were made within the two-year limitation period. The court specifically rejected the argument that service could be made at any time within the statutory period.

As to libelant's argument that mailing is an historic relic of the past, this court has said "that the mailing to the Attorney General could not 'be dispensed with as purely formal'." (*Messenger* v. *United States*, *supra*). See also *Glover* v. *United States*, 109 F. Supp. 701 (S. D. N. Y.); *Marich* v. *United States*, 84 F. Supp. 829, 832 (N. D. Calif.); *California Cas. Indem. Exchange* v. *United States*, 74 F. Supp. 404 (S. D. Cal.); *Barnes* v. *United States*, 67 F. Supp, 571 (S. D. N. Y.).

Libelant suggests that *McAllister* should be overruled. The problem is more basic than refusing to follow *McAllister*, *Messenger* and the other cases cited. Section 742 was enacted for a purpose. If Congress in the future decides that the Attorney General no longer needs to be notified by forthwith mailing, section 742 may be amended.

Finally, the Government's delay in answering or in calling libelant's failure to mail promptly to his atfention is not material because "The District Attorney had no power to waive conditions or limitations imposed by statute in respects of suits against the United States" (*Munro* v. *United States*, *supra*, p. 41).

Affirmed.

FRIENDLY, *Circuit Judge* (concurring):

Judge Moore's opinion is wholly convincing that there is no basis for believing the "forthwith" requirement of 46 U. S. C. §742 to be any less applicable to the mailing

of a copy of the libel to the Attorney General than to the service of a copy upon the United States Attorney. Hence, if, as the opinion assumes, every failure by a libelant to comply with a procedural step outlined in the Suits in Admiralty Act, 41 Stat. 525 (1920), is "jurisdictional" but only if so, its Draconian conclusion inexorably follows.

I cannot believe Congress meant anything of the kind: I should have supposed that, once Congress gave the basic consent to sue the United States, as it did in the first sentence of §2 of the Suits in Admiralty Act, 46 U. S. C. §742, it was content to have the courts decide the effect of various procedural lapses in the same manner as "if such vessel were privately owned or operated." The Act was "a comprehensive waiver by the United States" whereby "the government, in entering the shipping world as a participant, simply assumes a normal role in the antecedent pattern." Gilmore and Black, Admiralty (1957), pp. 773-774.

Nothing to the contrary was decided by this court in *Osbourne* v. *United States*, 164 F. 2d 767 (2 Cir., 1947), which held only that the "built-in" two-year statute of limitations, 46 U. S. C. §745, should be applied in the same way as were similar provisions in statutes relating to suits against private defendants. Indeed, even *Schnell* v. *United States*, 166 F. 2d 479, 482 (2 Cir.), cert. denied, 334 U. S. 833 (1948), a decision which Judge Frank, the author of the *Osbourne* opinion, characterized in dissent as resting "on the sheerest formality," 166 F. 2d at 484, did not speak in jurisdictional terms but sought to show the possibility of prejudice to the United States. However, the majority opinion in *Messenger* v. *United States*, 231 F. 2d 328 (2 Cir., 1956), arising under the Tort Claims

Act, 28 U. S. C. §§1346, 2401, 2671 et seq. and F. R. Civ. Proc. 4(d)(4), proceeds on "jurisdictional" lines, and *City of New York* v. *McAllister Brothers, Inc.*, 278 F. 2d 708, 710 (2 Cir., 1960), reaches a result explicable only on that basis, a basis altogther natural in view of the "jurisdictional" characterization of the statute of limitations in the Suits in Admiralty Act, 46 U. S. C. §745, in recent *in banc* opinions, *American-Foreign SS Corp.* v. *United States*, 265 F. 2d 136, 149 (dissenting opinion of Judge Clark) (2 Cir., 1958), vacated, 363 U. S. 685 (1960); 291 F. 2d 598, 603-604 (2 Cir.), cert. denied, 368 U. S. 895 (1961), but see 291 F. 2d at 616. The body of authority thus accumulated in this circuit is too heavy for a panel to overcome, and I perceive no indication of dissatisfaction with the course of decision by my brothers sufficient to warrant requesting consideration *in banc*, see Mr. Justice Frankfurter's opinion in *Western Pacific Railroad* case, 345 U. S. 247, 270 (1953). I therefore reluctantly concur.